

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7313

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PRESCOTT H. RATHBORNE, :

Plaintiff-Appellant :

-against- :

S. GARFINKEL and 873 THIRD AVENUE :

CORP., :

Defendants-Appellees : DOCKET NO. 75-7313

-and- :

CITADEL MANAGEMENT CO., INC., URBAN :

RELOCATION CO., INC., EDWIN J. GLICKMAN, : B

ODYSSEY HOUSE, INC., and SALBIAN :

REALTY CO., INC., :

Defendants. :

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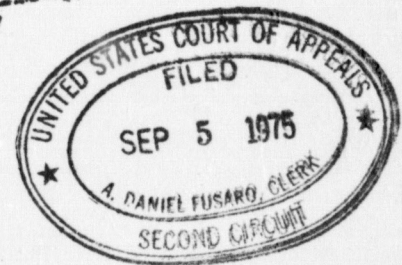
JOINT APPENDIX-VOL II

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1 approximately how many people did you have altogether?
2 Would it be 100 or 200?

3 THE WITNESS: That worked for me in my office?

4 THE COURT: Yes.

5 THE WITNESS: No, I wouldn't say that many.

6 THE COURT: Would it be 75?

7 THE WITNESS: Sometimes I would have a stenographer
8 for a day or whatever.

9 Q You used Apartment 4 for that purpose, am I right?

10 A I wouldn't say so.

11 Q What apartment did you use for that purpose?

12 A I really didn't have that much work going on.

13 Q Please answer the question.

14 THE COURT: When they came and worked, what
15 apartment did they use, 4 or 5?

16 THE WITNESS: Primarily they worked in 4.

17 Q You had various corporate names that you used in the
18 telephone book and on the door and on the exterior
19 of the building, am I correct, Mr. Rathborne?

20 A Correct.

21 Q Tell the Court some of the names that were used?

22 THE COURT: I have looked at those myself.

23 Q All right. When this axing incident took place, this
24 alleged axing incident took place, you say you know
25 Mr. Garfinkel didn't do it; is that correct?

1 Q Did you ever accost or threaten the Department of
2 Buildings inspector who attempted to gain access to
3 your apartment for the purpose of inspecting it with
4 a gun in your hand and say, "If you come in, I will
5 shoot you."? Did you ever do that?

6 A I would go to -- Your Honor, I would ----

7 Q Yes or no?

8 A No.

9 THE COURT: What did you do?

10 THE WITNESS: I think it is -- I would go during
11 this time when you sent all these people up there.

12 Q I sent them?

13 THE COURT: Let him testify.

14 A I would go to the door inside with a gun. I would make
15 sure they had credentials. And, if they did have
16 credentials, then I would let them in.

17 Q Did you have a permit for the gun?

18 A Yes, sir.

19 Q What kind of guns were they?

20 A I had two twelve gauge antique shotguns; I had a .22,
21 410 over and under ----

22 THE COURT: He had a lot of guns. Were there any
23 handguns?

24 THE WITNESS: No, sir.

25 THE COURT: He didn't have any handguns.

- 1 A Several times.
- 2 Q You weren't a customer of his, were you?
- 3 A No, sir.
- 4 Q But, was Mr. Rathborne a customer of Mr. Garfinkel's
- 5 liquor store?
- 6 A He would tell me -- I went down to buy.
- 7 Q You bought sometimes?
- 8 A I would go down, yes.
- 9 Q Did Mr. Rathborne go down to Mr. Garfinkel's liquor
- 10 store from time to time?
- 11 A Yes.
- 12 Q Did that happen in 1967, '68 and '69?
- 13 A I think so.
- 14 Q How about in 1970 and '71?
- 15 A '70 and '71 very rarely; I doubt it.
- 16 Q Was Mr. Rathborne and Mr. Garfinkel unfriendly towards
- 17 each other?
- 18 A I really can't say.
- 19 Q You were there four days a week, weren't you?
- 20 A Yes, but there were two different apartments. I was
- 21 mostly up on the top floor. I don't know if that's
- 22 five.
- 23 Q Where did Mr. Rathborne conduct his business, in 4 or
- 24 5?
- 25 A Four, the first floor, I guess that's four.

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- 1 Q What kind of business was he engaged in?
- 2 A When I first went there, it was called Rathborne
- 3 Productions.
- 4 Q Did he have quite a few people come to the place?
- 5 A Yes.
- 6 Q Did you ever see Mr. Garfinkel break Mr. Rathborne's
- 7 door or anything of that kind?
- 8 A The door was gouged.
- 9 Q Did you see the person that did it?
- 10 A I came in afterwards. Everybody was hysterical and
- 11 running around.
- 12 Q Who were these people who were hysterical?
- 13 A It was like, you know, Miss Allen; there was another
- 14 one.
- 15 Q Miss Allen was hysterical?
- 16 A Yes.
- 17 Q Was Mr. Rathborne hysterical?
- 18 A He was pacing up and down and red in the face. I
- 19 asked what was happening. They said, "Somebody --
- 20 sounded like somebody was trying to throw a bomb.
- 21 They tore down the door." I came in a few minutes after
- 22 this incident had happened.
- 23 Q Was Mr. Garfinkel there?
- 24 A I didn't see him, sir.
- 25 Q You never saw Mr. Garfinkel?

1 (Exhibits handed to witness.)

2 A Yes, I saw that. I saw this. In fact, all these I
3 have seen.

4 THE COURT: She has seen them all.

5 THE WITNESS: The majority I had to clean.

6 Q How many times did you have to clean large amounts of
7 garbage outside the door?

8 A At least twice a week.

9 THE COURT: At least twice a week for how many
10 years?

11 THE WITNESS: That didn't start with the garbage
12 until the last couple of years or so.

13 THE COURT: Twice a week there was a lot of
14 garbage that you had to clean.

15 THE WITNESS: Yes.

16 Q (By Mr. Jacobs) Did you ever bring the rent to
17 Mr. Garfinkel?

18 A Several times I took the rent to Mr. Garfinkel, yes.

19 Q Did he ever refuse to take the rent from you?

20 A Yes, sir.

21 Q How many times would you say?

22 A Each time, each period of time I went there.

23 Q He refused to take it?

24 A Yes.

25 Q Did he tell you why?

1 Q Aside from the one incident you have told us about
2 with Con Edison where you went to the store, did
3 you speak to Garfinkel in the period attempting
4 to get access?

5 A Not attempting to get access.

6 Q What occasion did you speak to him?

7 A I think there might have been several times that I
8 delivered a letter or the rent check. But I don't
9 recall speaking to him.

10 Q Did he ever refuse to take a rent check from you?

11 A No, not from me to my recollection.

12 Q You obtained lights in the hall, didn't you, by
13 jumping the wire in the hallway, didn't you?

14 A Uh-huh.

15 MR. STEINBERG: Your Honor, these are admissions.

16 THE COURT: Why are you complaining? He is trying
17 to help you out.

18 Q (By Mr. Jacobs) There was no air conditioning
19 in the summer?

20 A No.

21 Q You did whatever you could to get electricity?

22 A Yes. The food was going bad in the refrigerator.
23 You couldn't work in the dark. We couldn't get into
24 the basement to turn the electricity on.

25 THE COURT: Was that apartment air conditioned also?

1 A He had an air conditioner, yes.

2 THE COURT: But that was a different unit on
3 the roof?

4 THE WITNESS: Oh, yes.

5 THE COURT: Anything further?

6 MR. JACOBS: Nothing further, Your Honor.

7 THE COURT: Any cross-examination?

8 MR. STEINBERG: Just a few.

9 CROSS-EXAMINATION

10 BY MR. STEINBERG:

11 Q Mrs. Allen, you made a statement that a court order
12 was obtained to turn on the electricity. Would you
13 mind telling me when that order was obtained and who
14 brought it?

15 A I didn't actually see the order. I just knew there
16 was a court order and a electrician came out August
17 2nd.

18 MR. STEINBERG: Judge, in all the disclosures I
19 have heard, there is no court order.

20 THE COURT: Have you got a copy of that court
21 order?

22 MR. JACOBS: No, Your Honor. The attorney will
23 testify.

24 Q (By Mr. Steinberg) Mrs. Allen, just a few questions
25 then I'm finished.

1 This matter in Judge Wahl's chambers, you
2 mentioned the fact Mr. Garfinkel and Mr. Rathborne
3 got into an argument, isn't that right?

4 MR. JACOBS: Objection. She did not say they
5 had an argument.

6 MR. STEINBERG: She did. That's the testimony.

7 THE COURT: Wait a minute. Did they get into
8 an argument?

9 THE WITNESS: I wouldn't say it was a real argu-
10 ment, no. There was something that annoyed Mr.
11 Garfinkel.

12 Q That Mr. Rathborne stated; is that right?

13 A I don't remember exactly what happened before.

14 Q Did he get annoyed per se just being annoyed or did
15 he get annoyed because something was said to him?

16 MR. JACOBS: Objection. How was she supposed
17 to know how he got annoyed?

18 THE COURT: What did he say?

19 MR. STEINBERG: You asked the question Judge and
20 she told you they got into an argument. That's the
21 testimony. That's why I am just going over it for a
22 moment.

23 I ask, is your testimony accurate? Was
24 there an argument between Mr. Rathborne and
25 Mr. Garfinkel in the presence of Judge Wahl or in

1 Judge Wahl's chambers?

2 A I wouldn't call it an argument.

3 Q What would you call it?

4 A My impression of it was Mr. Garfinkel was annoyed
5 that he was being brought to court.

6 THE COURT: Will you tell me what Mr. Garfinkel
7 said and what Mr. Rathborne said?

8 THE WITNESS: I don't remember what Mr. Rathborne
9 said. All I remember is something.

10 THE COURT: She doesn't remember.

11 MR. STEINBERG: That's all. Thank you.

12 THE COURT: Call your next witness.

13 MR. JACOBS: Call Sylvia Pafenyk.

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1 SYLVIA PAFENYK

2 was thereupon produced as a witness in behalf
3 of the plaintiff, and having been first duly
4 sworn to tell the truth, the whole truth, and
5 nothing but the truth, was examined and testified
6 as follows:

7 THE CLERK: Be seated. State your full name
8 and spell your last name.

9 THE WITNESS: Sylvia Pafenyk, P-a-f-e-n-y-k.

10 EXAMINATION

11 BY THE COURT:

12 Q Is that Miss or Mrs.?

13 A Mrs.

14 Q Are you a licensed real estate broker?

15 A I am.

16 Q Do you have an office at 200 East 53rd Street?

17 A We have moved from there.

18 Q You moved from there in 1972?

19 A Yes.

20 Q Did you occupy an office in that building?

21 A Yes, Your Honor.

22 Q Where was that with reference to the premises of
23 Mr. Rathborne?

24 A Our door was the opposite of his door. The entry to
25 the office was opposite his.

1 Q Did you use the same entranceway downstairs as he did?

2 A We did.

3 Q Did you find it to be dirty and filthy from time to
4 time?

5 A From time to time the stairs needed a mopping; and,
6 we would, if it annoyed us excessively, we would tell
7 Mr. Garfinkel and he would have one of his employees
8 mop the hall.

9 Q Was there a great deal of garbage strewn around there
10 two or three times a week?

11 A Not during the period we were there.

12 Q When were you there?

13 A Well, we started business in April of '72 and occupied
14 the premises until last February.

15 Q So, you were there when Mr. Rathborne vacated the
16 premises?

17 A Yes.

18 Q During that period of time, you didn't see garbage and
19 refuse and things of that kind on the floor period-
20 ically?

21 A Well, the garbage was collected in the back of the hall.
22 There was a garbage can; there were times when the
23 garbage overflowed, the garbage cans; but on our
24 landing where our office entrance was, I never saw
25 garbage.

1 called the police in that would give the building
2 a bad reputation or what have you. He wanted to
3 emphasize to Prescott he was very upset. He was very
4 angry and Prescott was, Your Honor, very low-keyed
5 and unresponsive. I just kind of stood there.

6 Q Did Mr. Garfinkel accuse him of doing that himself?

7 A I don't recall that he did accuse him of doing it
8 himself; but he may have had that impression; I don't
9 know what the point would have been. He was very upset.
10 He did get very angry that this had occurred, his
11 property had been damaged; and, I was afraid for his
12 health.

13 Q Whose health?

14 A Sol's health. He was standing on the stairs and very
15 angry and turned red. I thought he was going to have a
16 stroke right then and there.

17 Q Is he an excitable man?

18 A Well, at that particular time, he was.

19 Q Have you ever seen him excited and nervous and screaming
20 before?

21 A No, I don't think I have.

22 Q How about Mr. Rathborne, is he always low-keyed and
23 quiet?

24 A Generally, whenever I did encounter him, yes, he is
25 very mild-spoken and soft-mannered.

1 Q So you didn't recognize any deterioration in his
2 health then, did you?

3 A I saw him very infrequently. He told me that he was
4 afraid for his life. And, he did seem agitated.

5 Q Did you see a dog he had?

6 A Yes, he introduced me to the dog and told me he had
7 purchased the dog to protect his life.

8 Q Did your lights go out too?

9 A Yes.

10 Q What about the lights in the entire building?

11 A No, not every light in the building was off. I
12 think there was one light in the outer office that was
13 working. But I know our electricity, typewriters
14 wouldn't work nor the air conditioning in our offices.

15 Q But your lights were on?

16 A Well, not the lights in one office that we had a
17 suite. There was one light that was working in the
18 central entry office.

19 Q Did you ever find out what caused the failure of the
20 electricity?

21 A We tried; we tampered with all our fuses and so on to
22 test those because we didn't realize the lights were
23 out in any of the other apartments; and, we couldn't
24 fix those.

25 Q Did you call Con Edison?

- 1 A No, I think we spoke to Sol. He said he was trying
2 to have it fixed; and, they were working on it.
3 They had called the electrician as were most people
4 who come in, you had to sort of wait until they
5 arrived.
- 6 Q Did Mr. Rathborne accuse Mr. Garfinkel of breaking
7 down that door?
- 8 A He privately expressed that opinion to me. But, I
9 don't think he ever said it in my presence to
10 Mr. Garfinkel.
- 11 Q He thought Mr. Garfinkel had sent people up there to
12 do that in order to harass him?
- 13 A Yes, that was his impression. I thought it was a
14 lunatic on the loose on the streets.
- 15 Q Did you ever think Mr. Rathborne was paranoid?
- 16 A Well, I didn't think Sol was a killer-type. So, I
17 thought Prescott's impression that his life was en-
18 dangered by Sol was unfounded. Prescott also expressed
19 the opinion that his life was endangered by the group
20 that was assembling the block; and, he gave me some
21 articles to indicate that there was good reason to
22 have such impression.
- 23 Q That these people were killers?
- 24 A Yes.
- 25 Q Who were those people?

1 Mr. Steinberg agreed I didn't have to call him.
2 I haven't called him as a witness. I do have a memo
3 with regard to this incident which I could show him
4 as a stipulation. The man came on August 2nd and
5 made the repairs and found it had been tampered with.

6 MR. STEINBERG: I stipulate if the man were here,
7 he would state he made a repair. The word tampering is
8 a conclusion. He's got to show who did it. I will
9 not go back on my word.

10 THE COURT: He doesn't have to show who did it.
11 Mr. Steinberg, that isn't the way I understood it.

12 MR. STEINBERG: Fine. If you understood it
13 otherwise, all right.

14 MR. JACOBS: I understand he would testify that
15 it had been tampered with, but he would not testify
16 who did the tampering.

17 THE COURT: That's correct.

18 MR. STEINBERG: That's a different way of saying
19 what I said.

20 MR. JACOBS: Your Honor, could I have -- I hate
21 to ask for about a five-minute recess, Your Honor, I have
22 one more witness here with regard to the damage issue.
23 Because of the damage issue, I had not talked to him.
24 If I could talk to him for about five minutes, he will
25 be my last witness.

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- 1 Q What did you hear him say?
- 2 MR. JACOBS: Who?
- 3 MR. STEINBERG: Mr. Rathborne.
- 4 THE WITNESS: Well, he was -- he didn't know what
- 5 to say. He was accusing the landlord. He said, "Was
- 6 it him?" He had his secretary with him. He said,
- 7 "Was it him, was it him?" They were going around
- 8 trying to accuse people who it was. I said, "I don't
- 9 know what's going on over here."
- 10 Q (By the Court) Did you hear Mr. Garfinkel make some
- 11 threatening remarks to Mr. Rathborne?
- 12 A No.
- 13 Q Did he say to him, "I'm going to get you."?
- 14 A No, sir.
- 15 Q Did he tell Mr. Rathborne, "This is just the result
- 16 of what you have been doing over a period of time
- 17 and unless you start cooperating, things are going
- 18 to get worse."?
- 19 A No.
- 20 Q Did he say anything about cooperation?
- 21 A The policeman was there. The policeman said, "Look,
- 22 fella, you're not going to resolve it. Go to court.
- 23 That's it." He left.
- 24 Q You wanted him to cooperate, didn't you?
- 25 A I did. I sure did.

1 Q Did you ask him to cooperate?

2 A Rathborne?

3 Q Yes.

4 A Yes.

5 Q Did Mr. Garfinkel then say, "This is the result of your
6 lack of cooperation."?

7 A No.

8 Q You didn't hear him say that?

9 A No.

10 Q Are you still in the building?

11 A Oh, sure.

12 Q You get along all right with Mr. Garfinkel?

13 A Very good.

14 Q But you didn't get along too well with Mr. Rathborne,
15 did you?

16 A I got along very nicely until all of a sudden he didn't
17 like my business. He said, "My business -- he built
18 a little garden upstairs. It's these kind of
19 businesses --" It's a fact of life. We employ fifteen
20 people. We give people good food at reasonable prices.
21 He said, "I don't like it here. It downgrades the
22 neighborhood." I said, "You're wrong. You're absolutely
23 wrong. We keep a clean place. The place cost me
24 \$110,000 to build eight and a half years ago."

25 Q Did he tell you how much money he spent on his place

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1 and that's why he wanted that kept up?

2 A No.

3 Q Never told you that?

4 A No.

5 Q He said you were denigrating the neighborhood?

6 A Yes.

7 Q Did he like the Odyssey House?

8 A I don't think so.

9 Q What did he tell you?

10 A He said, "All these characters are coming around this
11 area." They were starting to put Odyssey Houses in
12 the development.

13 Q Did you notice he was getting nervous and upset at any
14 time?

15 A He was always nervous. You could never figure him out.
16 I always talked and was always soft-spoken. You never
17 knew how he was going to be talking. I set in his
18 apartment. He had a nice apartment. We talk and
19 sometimes I get through to him and he let me make a
20 repair; sometimes I couldn't hear it, we were talking
21 and I would walk out. I say, "Okay, Pres." You know,
22 it was very compatible and other times, he would get
23 excitable. I would say, "What you get excited for?"

24 Q Tell me about this calmness in 1967, '68 and '69, was
25 he pretty calm during that period of time?

1 A Basically, yes, with me anyway.

2 Q Did you ever see him excited? Did you ever see him
3 scream and yell and shout?

4 A One time when the fellow came down from the roof,
5 my mechanic said the guy pulled a shotgun. I said,
6 "I don't understand."

7 Q Did you go talk to him?

8 A No. I didn't want to go at that time. I said, "Don't
9 go up there, you know."

10 Q Why didn't you want to go?

11 A I talked to him later. I said, "Pres, that shotgun,
12 if it was me, you would be eating that shotgun."
13 That's a terrible thing to do when you pull a gun
14 on a man. He said, "I was only joking." I said,
15 "They're not coming back here again." He said it
16 wasn't even loaded. I said, "That's a hell of a thing
17 to do. I definitely would press charges. We can talk.
18 But the minute you pull a gun on a guy, that's a
19 little too much."

20 Q Did he tell you why he was moving?

21 A I didn't even know he was moving. No one knew he was
22 moving, to my knowledge. I was exceedingly happy.
23 I knew I could fix my air conditioner. I know my
24 people were very happy.

25 THE COURT: Go ahead, Mr. Jacobs.

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REDIRECT EXAMINATION

BY MR. STEINBERG:

Q Were you ever present in a dispute between Mr. Rathborne where you heard a vicious or racial epitaph, an expression used by Mr. Rathborne against Mr. Garfinkel?

A Mr. Rathborne used to always refer to Mr. Garfinkel -- not always, but he used to refer to him as that Jew landlord or "How are you making out with that Jew landlord?"

Q That's what he would tell you?

A A few times, yes.

MR. STEINBERG: That's all.

THE COURT: You are excused. Call your next witness.

MR. JACOBS: Miss Rosenblatt.

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1 MR. JACOBS: No further questions.

2 CROSS-EXAMINATION

3 BY MR. STEINBERG:

4 Q These plants were in boxes, weren't they?

5 A From the floor.

6 Q Boxes can be moved; isn't that right?

7 A Sometimes.

8 Q Why not -- what would prevent a box from being moved?

9 A The way the soil sits, every size box, it may not have
10 any way of exiting.

11 Q If a man places a value of \$100,000 on those plants,
12 it is to his interest to remove them because he says
13 he loves them; isn't that right?

14 A These things aren't so easily moved.

15 Q That isn't the question. If a man spends a lot of
16 time developing these plants and spends the money you
17 think he spent, when he vacates, don't you feel he
18 should have taken them with him?

19 MR. JACOBS: Objection.

20 THE WITNESS: Not necessarily because the expense
21 of moving an established plant might be a lot more than
22 just starting over new.

23 Q They are in boxes and boxes are movable. They weren't
24 attached to the floor, were they?

25 A Again, the size of these boxes, as I have been told, all

1 Q You never was?

2 A Never. Judge, permit me to elaborate on one thing
3 else. With all due respect, I have done my share
4 in real estate in this profession in the City of
5 New York. I have done a lot of it. I have complete
6 knowledge, thorough knowledge of the rent regulations
7 in keeping my clients out of problems. I make it a
8 practice when the tenant calls up wanting something
9 done, I say to them, "Here is the number of the service
10 company. You call them. You make your own appointment."
11 When Mr. Garfinkel told me he had trouble with the roof,
12 I gave him the number of Academy Roofing, a firm that
13 I use. I said to him, "You call him up. You mention
14 my name." I will call them. I make it a practice
15 that he must fix everything for one reason that has
16 not been brought out. I'd like to call your attention
17 to it. If you read my lease, you will find that
18 we are subject to a master lease on this property.
19 We are not the fee owner, Judge. We are a lessee
20 landlord. That means we must maintain this property
21 properly otherwise we are exposed to a default.

22 Now something else has been touched on here about
23 a million-dollar statement that we supposedly had gotten.
24 Let me give you the facts on that, Judge. We know
25 nothing about assemblage except what we hear.

1 A I don't even know what you said because I don't know
2 those words. They are too big for me.

3 Q You sign anything your lawyer tells you to sign?

4 A I do. I would do most of it, yes.

5 Q True or untrue, you would sign it?

6 A No, I wouldn't say that. The wordings look high class.
7 I signed it.

8 Q Now, you heard Mrs. Allen testify and Sylvia testify
9 about the axing incident. Was their testimony accurate?

10 A I could say it could be accurate. She said she saw
11 somebody running down the stairs. Then after I calmed
12 down, she said, "Sol, there was somebody there who came
13 down." But, I pieced together, I don't know who it
14 would have been. It would have to do with Mr.
15 Rathborne.

16 THE COURT: All right. Anything else?

17 MR. JACOBS: Yes, Your Honor.

18 THE COURT: Go ahead.

19 Q Did you testify at your deposition at the time of the
20 accident you did not threaten Mr. Rathborne?

21 A At the time of the axing?

22 Q We are talking about an axing incident where you went
23 up there.

24 A I thought you said an action. Did you say axing?

25 Q Yes.

